Supreme Court, U.S.
FILED

09-797 DEC 31 2009

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No.

In The
Supreme Court of the United States

DAVID C. RODEARMEL, *Appellant*,

v.

HILLARY RODHAM CLINTON, *et al.*, *Appellees*.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

(1) Whether an Officer of the United States, when placed in a position where he must either violate his oath of office or risk substantial, adverse consequences to his employment, has standing to maintain a challenge to the appointment of a constitutionally ineligible superior.

(2) Whether members of Congress who are otherwise ineligible for appointment to an office in the Executive Branch under the plain language of Article I, section 6 of the Constitution, can have their eligibility restored by an act of Congress.

PARTIES TO THE PROCEEDINGS

David C. Rodearmel, a commissioned U.S. Foreign Service Officer employed by the U.S. Department of State, is the appellant ("Plaintiff"). The appellees are Hillary Rodham Clinton, U.S. Secretary of State, and the U.S. Department of State ("Defendants"). In addition, participating as *amicus curiae* before the district court was a group of professors of linguistics, who submitted a brief on possible interpretations of the constitutional provision at issue.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (App., *infra*, 1a – 17a) is not yet reported.

JURISDICTION

The district court had exclusive jurisdiction over this action pursuant to Public Law No. 110-455, 122 Stat. 5036, which allows any person aggrieved by an action of the U.S. Secretary of State to contest "the constitutionality of the appointment and continuance in office of the Secretary of State on the grounds that such appointment and continuance in office is in

violation of article I, section 6, clause 2, of the U.S. Constitution." Pub. L. No. 110-455, 122 Stat. 5036, § 1(b)(1) (2008). This same statute provided that any such challenge be heard and determined by a three-judge panel in accordance with 28 U.S.C. § 2284. *Id.* at 1(b)(2).

The district court issued an order (App., *infra*, 18a – 19a) dismissing this action on October 29, 2009. A notice of appeal to this Court (App., *infra*, 20a – 21a) was filed on November 3, 2009. The jurisdiction of this Court is invoked under Public Law No. 110-455, 122 Stat. 5036 (codified at 5 U.S.C. § 5312 note), which provides:

> (A) Direct appeal to supreme court. – An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order upon the validity of the appointment and continuance in office fo the Secretary of State under article I, section 6, clause 2, of the Constitution, entered in any action brought under this subsection. Any such appeal shall be taken by a notice of appeal filed within 20 days after such judgment, decree, or order is entered.
>
> (B) Jurisdiction. – The Supreme Court shall, if it has not previously ruled on the question presented by an appeal taken under subparagraph (A), accept

> jurisdiction over the appeal, advance the appeal on the docket, and expedite the appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 6, clause 2 of the United States Constitution provides, in relevant part:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

U.S. Const., art. I, § 6, cl. 2 (App. 23a).

The U.S. Congress adopted a Joint Resolution on December 10, 2008, effective at noon on January 20, 2009, reducing the "compensation and other emoluments" of the office of the U.S. Secretary of State to those in effect on January 1, 2007:

> Section 1. COMPENSATION AND OTHER EMOLUMENTS ATTACHED TO THE OFFICE OF THE SECRETARY OF STATE.
>
> (a) In General. -- The compensation and other emoluments attached to the office of Secretary of State shall be those in effect January 1, 2007, notwithstanding any increase in such compensation or emoluments after that date under any provision of law, or provision which has the force and effect of law, that is enacted or becomes effective during the period beginning at noon of January 3, 2007, and ending at noon of January 3, 2013.

See Public Law No. 110-455, 122 Stat. 5036. App., *infra*, at 23a (hereafter referred to as the "Joint Resolution").

STATEMENT

This appeal presents the important question of whether the political branches of government can evade the clear and precise language of a provision of the Constitution through the use of a legislative "fix." The Ineligibility Clause (Art. I, sec. 6, cl. 2) prohibits members of Congress from being appointed to a civil office, such as a cabinet post, during the term for which they were elected, if the "emoluments" for that office increased during that term. In this case, the salary of the U.S. Secretary of State was increased

three times during Mrs. Clinton's second term in the U.S. Senate. A subsequent "rollback" of the salary by Congress does nothing to remedy this ineligibility for office, as no such "work around" is authorized by the Constitution and cannot alter the fact that these increases in salary occurred.

As provided for by Congress in the Joint Resolution, this significant issue was reviewed on an expedited basis before a three-judge district court. The district court concluded that Plaintiff lacked standing to challenge Mrs. Clinton's appointment, despite ample allegations that Plaintiff had been placed in a position where he must either violate his oath of office or risk substantial, adverse consequences to his employment. In so doing, the district court adopted an unduly constricted view of "oath of office" standing, as recognized by this Court in *Board of Education v. Allen*, 392 U.S. 236 (1968). The district court then denied Plaintiff's cross-motion for summary judgment without ruling on the question raised regarding the Ineligibility Clause.

In addition to the issue of standing, the key question before the district court and now this Court is whether the Joint Resolution "fixes" Mrs. Clinton's constitutional ineligibility. This Court should note probable jurisdiction and resolve these important questions.

A. The Ineligibility Clause and the Appointment of Mrs. Clinton.

On January 21, 2009, Hillary Rodham Clinton was sworn in as U.S. Secretary of State. Prior to this, Mrs. Clinton served as a U.S. Senator from the State of New York, re-elected to a second, six-year term in November 2006. Her second term began in January 2007 and does not expire until January 2013. During Mrs. Clinton's second term in the U.S. Senate, the compensation paid to the U.S. Secretary of State increased three times by Executive Order: (i) by Executive Order 13420, issued December 21, 2006, the U.S. Secretary of State's salary was increased to $186,600, effective on or after January 1, 2007; (ii) by Executive Order 13454, issued January 4, 2008, the U.S. Secretary of State's salary was increased to $191,300, effective on or after January 1, 2008; and (iii) by Executive Order 13483, issued on December 18, 2008, the U.S. Secretary of State's salary was increased to $196,700, effective on or after January 1, 2009.

The U.S. Constitution states, in pertinent part:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, . . . the Emoluments whereof shall have been encreased during such time[.]

U.S. Const., art. 1, § 6, cl. 2.

The office of the U.S. Secretary of State is a "civil Office under the Authority of the United States" as described in article I, section 6, clause 2 of the U.S. Constitution, and the "emoluments" of that office increased during the time Mrs. Clinton was elected to serve and did serve as U.S. Senator from the State of New York.

The U.S. Congress recognized the restrictions that article I, section 6, clause 2 of the U.S. Constitution placed on Mrs. Clinton's eligibility to serve as Secretary of State, when, on December 10, 2008, it passed the Joint Resolution, effective at noon on January 20, 2009, reducing the "compensation and other emoluments" of the office of the U.S. Secretary of State to those in effect on January 1, 2007. *See* Pub. L. No. 110-455, 122 Stat. 5036 (App. 23a). The Joint Resolution was signed by President Bush and became law on December 19, 2008. However, the Joint Resolution did not and cannot change the historical fact that the "compensation and other emoluments" of the office of the U.S. Secretary of State increased during Mrs. Clinton's tenure in the U.S. Senate.

As Plaintiff demonstrated before the district court, Mrs. Clinton is constitutionally ineligible to serve as the U.S. Secretary of State by reason of article I, section 6, clause 2 of the U.S. Constitution. She will not be eligible to hold that civil office under the authority of the United States until the second, six-year term to which she was elected expires in January 2013.

B. Plaintiff's Background.

As a commissioned U.S. Foreign Service Officer, Plaintiff serves under, takes direction from, and reports to the U.S. Secretary of State. Plaintiff has been a commissioned U.S. Foreign Service Officer at the U.S. Department of State since 1991. He currently holds the rank of FSO O-2, and also is a retired U.S. Army Judge Advocate General Reserve Officer with the rank of Lieutenant Colonel. Prior to becoming a Foreign Service Officer, Plaintiff served as a military lawyer and an intelligence officer in the U.S. Army. Plaintiff has received numerous awards and commendations from both the U.S. Department of State and the U.S. military. Plaintiff also has had numerous teaching assignments, including serving as an Assistant Professor of Political Science at the U.S. Air Force Academy, and as an Instructor of International Law, U.S. Constitutional Law, and other legal areas for the Defense Institute of International Legal Studies and the University of Maryland Berlin Education Center. Plaintiff holds a Bachelor of Arts degree from Brigham Young University in Provo, Utah, a Juris Doctorate from the University of Washington in Seattle, Washington, a Master of Laws from the Judge Advocate General's School, U.S. Army, in Charlottesville, Virginia, and a Master of Arts degree from the U.S. Naval War College in Newport, Rhode Island.

Plaintiff is being aggrieved by the actions of Mrs. Clinton and the U.S. Department of State. Namely, Plaintiff is being required to serve under,

take direction from, and report to Mrs. Clinton, who is constitutionally ineligible to be appointed to or serve as U.S. Secretary of State until at least 2013, when her current U.S. Senate term expires.

Plaintiff's complaint alleged that he is being injured in his employment by being required to serve under, take direction from, and report to a constitutionally ineligible superior, Mrs. Clinton. Plaintiff further alleged that this requirement is in direct and unequivocal conflict with his oath and that he cannot serve under Mrs. Clinton without violating his oath. Plaintiff also alleged that, should he refuse to serve under, take direction from, or report to Mrs. Clinton, he will be at substantial risk of disciplinary action, including removal, for insubordination or other, related grounds. Finally, Plaintiff alleged that being required to serve under, take direction from, and report to a constitutionally ineligible superior materially and fundamentally (and adversely) changes the terms and conditions of his employment as a U.S. Foreign Service Officer.

Defendants moved to dismiss the complaint, arguing that Plaintiff lacked standing to raise his claims or, in the alternative, that Mrs. Clinton's appointment does not violate the Ineligibility Clause. Plaintiff cross-moved for summary judgment on the grounds that an increase in the salary of a civil office disqualifies Mrs. Clinton from being appointed to that office under the Ineligibility Clause, despite Congress' subsequent legislation to "roll back" the salary of the office to the time Mrs. Clinton's term began. In an

opinion issued on October 29, 2009, the three-judge district court dismissed the complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. App. 1a – 17a. The court ruled that Plaintiff lacked Article III standing on the basis that Plaintiff did not adequately allege an injury in fact. The district court also concluded that Plaintiff did not have prudential standing because Mrs. Clinton is not alleged to have "given [Plaintiff] any specific order or direction or taken any other action that has aggrieved him." *Id.* at 8a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The substantial nature of the questions presented are made plain by Congress' express provision for expedited direct review in this Court. Pub. L. No. 110-455, 122 Stat. 5036 (App. 22a – 25a). The Joint Resolution specifically provides that

> An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order upon the validity of the appointment and continuance in office of the Secretary of State under article I, section 6, clause 2, of the Constitution, entered in any action brought under this subsection.

Id. at § 3(A); (App. 24a).

Congress further stressed the significance of resolving the Joint Resolution's validity by providing for mandatory, expedited review in this Court over a ruling on that issue appealed to the Court:

> The Supreme Court shall, if it has not previously ruled on the question presented by an appeal taken under subparagraph (A), accept jurisdiction over the appeal, advance the appeal on the docket, and expedite the appeal.

Id. at § 3(B); (App. 25a). In light of these clear directives by Congress, the Court should note probable jurisdiction and review the substantial questions presented in this case.

I. Plaintiff Has Standing To Bring This Action As He Has Been Placed In A Position Where He Must Either Violate His Oath Of Office Or Risk Substantial, Adverse Consequences To His Employment.

Plaintiff demonstrated in the district court that he is being injured in his employment by being required to serve under, take direction from, and report to a constitutionally ineligible superior, Mrs. Clinton. This is because Plaintiff has been placed in a position where he either must violate his oath of office or risk substantial, adverse consequences to his employment.

Plaintiff is one of approximately 6,500 commissioned U.S. Foreign Service officers at the U.S. Department of State. Plaintiff was nominated to this position by the President and confirmed by the U.S. Senate, as are all U.S. Foreign Service Officers.[1] *See* 22 U.S.C. § 3942(a)(1). The U.S. Foreign Service is distinct from other types of federal employment in that it is a corps of highly-trained, career professionals dedicated to the specific field of foreign affairs. *See, e.g.*, 22 U.S.C. § 3901(a)(2) ("The scope and complexity of the foreign affairs of the Nation have heightened the need for a professional foreign service . . . that can provide a resource of qualified personnel for the President, the Secretary of State, and the agencies concerned with foreign affairs"). Significantly, as a U.S. Foreign Service Officer, Plaintiff also is an "Officer of the United States," a position to which is delegated a portion, albeit small, of the sovereign powers of the United States. 31 Op. O.L.C. ___ (2007); 2007 OLC LEXIS 3, **12-74 (April 16, 2007).

When Plaintiff became a commissioned U.S. Foreign Service Officer and an Officer of the United States, he took an oath to support, defend, and bear true faith and allegiance to the Constitution and to "well and faithfully discharge" the duties of his office. Having to serve under, take direction from, and report to a constitutionally ineligible superior diminishes the office to which an "Officer of the United States" has

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[1] Plaintiff was nominated by President George H. W. Bush and confirmed by the U.S. Senate in 1991.

been appointed, if not the sovereign power of the United States that has been delegated to that officer. Under the district court's cribbed view of standing, however, not even an "Officer of the United States" can maintain a challenge to violation of the Constitution that affects his or her own office, which is the injury Plaintiff seeks to remedy here.

Plaintiff is being harmed in his employment because he is being required to serve under, take direction from, and report to a constitutionally ineligible superior in direct and unequivocal conflict with the oath that Plaintiff took to defend and bear true faith and allegiance to the U.S. Constitution and to faithfully discharge the duties of his office. Because Mrs. Clinton is constitutionally ineligible to serve as U.S. Secretary of State, Plaintiff cannot serve under Mrs. Clinton without violating his oath. Should Plaintiff refuse to serve under, take direction from, or report to Mrs. Clinton, Plaintiff would be at substantial risk of disciplinary action, including removal, for insubordination or other, related grounds. Requiring Plaintiff to serve under, take direction from, and report to Mrs. Clinton materially and fundamentally changes the terms and conditions of Plaintiff's employment as a U.S. Foreign Service Officer at the U.S. Department of State. Not only does being required to serve under, take direction from, and report to Mrs. Clinton violate Plaintiffs' oath if he is to continue in his employment as a U.S. Foreign Service Officer at the U.S. Department of State, but it constructively discharges him from his employment as

a U.S. Foreign Service Officer if he is to remain faithful to his oath.

This Court has recognized that placing a plaintiff in a position where he either must violate his oath of office or risk substantial, adverse consequences constitutes a direct, personal, and concrete injury for purposes of standing. In *Board of Education v. Allen*, 392 U.S. 236 (1968), a local school board brought an action challenging the constitutionality of a state statute that required local public school authorities to lend textbooks free of charge to private parochial schools. The Court found there could be "no doubt" that the school board members had a personal stake in the outcome of litigation sufficient to confer standing:

> Appellants have taken an oath to support the United States Constitution. Believing [the state statute] to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step – refusal to comply with [the state statute] – that would be likely to bring their expulsion from office . . . .

Allen, 392 U.S. at 241, n.5.

Relying upon *Allen*, other courts have reached substantially similar conclusions regarding oath-based standing. For example, in *Clarke v. United States*, 705 F. Supp. 605 (D.D.C. 1988), the members of the City Council of the District of Columbia brought suit to

challenge a federal statute that required them to adopt an amendment to the District of Columbia Human Rights Act or face a loss of federal funding. The court found that the members had "oath" standing, citing this Court's ruling in *Allen*:

> Alternatively, the court finds plaintiffs have oath of office standing, under the principles recognized by the Supreme Court in [*Allen*]. In *Allen*, the Court found that legislators who had taken an oath to uphold the Constitution had standing to challenge the constitutionality of a law when they risked a concrete injury by refusing to enforce the law. In that case, plaintiffs faced a choice of violating their oaths by enforcing a law which they believed to be unconstitutional or risk expulsion from their jobs. Plaintiffs here are similarly placed. Because Congress has conditioned all District funds on the Council's vote, the Council members must either vote in a way which they believe violates their oaths, or face almost certain loss of their salaries and staffs as well as water, police and fire protection.

Clarke, 705 F. Supp. at 608 (internal citations omitted); *see also Regents of the Univ. of Minn. v. NACC*, 560 F.2d 352, 363-64 (8th Cir. 1977), *cert. dismissed*, 434 U.S. 978 (1977); *Aguayo v. Richardson*,

473 F.2d 1090, 1100 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

If anything, Plaintiff's injury is more concrete and compelling than the circumstances of the board members in *Allen* because Plaintiff's injury is far more directly and inextricably intertwined with his employment. Because Plaintiff is a U.S. Foreign Service Officer and an employee of the Department of State, he must serve under, take direction from, and report to Mrs. Clinton.[2] Requiring Plaintiff to serve under, take direction from, and report to a constitutionally ineligible superior in violation of his oath is a fundamental and material change in the terms and conditions of Plaintiff's employment. Mrs. Clinton and the Department of State have placed Plaintiff in the position of either violating his oath or disregarding his chain of command, an action which would result in almost certain disciplinary action, including removal, being taken against Plaintiff. While the school board members in *Allen* eventually may have had to face dissatisfied voters or lawsuits brought against them in their official capacities, such a circumstance is not nearly as personal or direct as the injury Plaintiff has suffered to his employment at the Department of State. If Plaintiff remains true to his oath, he faces the very real risk of being discharged from his highly specialized, chosen profession. If the

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[2] By way of example, one of Plaintiff's duties includes preparing numerous Eastern Europe country reports for the Secretary of State's annual International Religious Freedom Report to Congress.

plaintiffs in *Allen* had standing, then Plaintiff surely does.

The district court's contention that Plaintiff has not been required to take any particular action in violation of the Constitution (App. 15a) simply belies the reality of the conflict raised by Mrs. Clinton's appointment. It is undisputed that Plaintiff is required to serve under, take direction from, and ultimately report to Mrs. Clinton. Like the plaintiffs in *Allen*, Plaintiff is being required to engage in conduct – in this instance, to serve under, take direction from, and ultimately report to a constitutionally ineligible superior – that clearly is contrary to his oath. In fact, Plaintiff is required under federal law to serve under, take direction from, and report to the Secretary of State. *See, e.g.*, 22 U.S.C. § 2651a(a)(3)(A) ("The Secretary shall administer, coordinate, and direct the Foreign Service of the United States"); § 3904 ("Members of the Service shall, under the direction of the Secretary, represent the interest of the United States . . . "); § 3921 (". . . the Secretary of State shall administer and direct the Service and shall coordinate its activities with the needs of the Department of State and other agencies."); and § 4010(1)(a) ("The Secretary may decide to separate any member from the Service for such cause as will promote the efficiency of the Service."). Just as the school board members in *Allen* had taken an oath that they believed was inconsistent with the state law's commands, Plaintiff has taken an oath that is inconsistent with these acts of serving under, taking direction from, and reporting to a constitutionally

ineligible superior. Plaintiff has alleged a direct injury to the oath he took as a U.S. Foreign Service Officer and an Officer of the United States and fundamental, material, and adverse changes to the terms and conditions of his employment at the Department of State.

The district court's reliance upon two previous, and entirely different, cases challenging presidential appointments under the Ineligibility Clause is misplaced. App. 9a – 13a. In *Ex Parte Levitt*, 302 U.S. 633 (1937), in a one paragraph opinion, the Court held:

> The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient he has merely a general interest common to all members of the public.

Id. Again, Plaintiff has demonstrated much more than a general interest common to all members of the public. In addition, members of the bar of the Supreme Court obviously are not employees of this

Court nor do they receive pay checks from this Court. They do not serve under, take direction from, or report to the justices of the Court in anything like the way a U.S. Foreign Service Officer serves under, takes direction from, and reports to the Secretary of State. Hence, Plaintiff's relationship to the Secretary of State is not at all analogous to the relationship between a member of the Supreme Court bar and a justice of this Court.

McClure v. Carter, 513 F. Supp. 265 (D. Idaho 1981), also is inapposite. That lawsuit concerned the efforts by a U.S. Senator to invoke the Ineligibility Clause to challenge the appointment of former Congressman Abner J. Mikva to the D.C. Circuit. The Senator did not invoke his oath of office, but instead contended that his special duties and responsibilities as a senator gave him standing. *McClure*, 513 F. Supp. at 270. The court found that the appointment of Congressman Mikva to the federal bench did not impair the effectiveness of the Senator's vote and, therefore, that the Senator lacked standing. *Id.* By contrast, requiring Plaintiff to serve under, take direction from, and report to a constitutionally ineligible superior impairs Plaintiff's effectiveness as a U.S. Foreign Service Officer and an Officer of the United States because doing so is in direct conflict with Plaintiff's oath. It also fundamentally, materially, and adversely alters the terms and conditions of Plaintiff's employment at the Department of State. Consequently, Plaintiff more than adequately demonstrated that he is suffering a concrete, personal injury by reason of Defendants' conduct.

Finally, while the district court did not rule on the redressability component of standing, Plaintiff's injury can be redressed through the issuance of a declaratory judgment and an appropriate injunction. This Court clearly has the authority to "say what the law is" (*Marbury v. Madison*, 5 U.S. 137 (1803)), and declare Mrs. Clinton constitutionally ineligible to serve as Secretary of State until the period of her ineligibility expires and to enjoin her from serving in that capacity. An appropriate injunction enjoining the U.S. Department of State from requiring Plaintiff to serve under, take direction from, or report to a constitutionally ineligible superior also is well within the authority capability of the judiciary.

In sum, Plaintiff demonstrated a concrete injury to his continued employment as an Officer of the United States in that he is being required to serve under, take direction from and report to a constitutionally ineligible superior, Mrs. Clinton, in violation of the oath he has taken to support, defend, and bear true faith and allegiance to the Constitution of the United States. Moreover, Plaintiff's injuries are fully redressable by this Court, which, consistent with its power to "say what the law is" and to give effect to its rulings, can and should declare that Mrs. Clinton is constitutionally ineligible to serve as Secretary or State, enjoin her from continuing to serve in that capacity, and enjoin the U.S. Department of State from

requiring Plaintiff to serve under, take direction from and report to her.

This Court should note probable jurisdiction and decide whether oath-based standing remains available to a plaintiff that has been placed in a position where he must either violate his oath of office or risk substantial, adverse consequences to his employment. This is a substantial issue.

II. Mrs. Clinton's Appointment Is Contrary to the Ineligibility Clause And Cannot Be Fixed By An Act of Congress.

At the core of this case is the casual disregard of a clear and unambiguous directive of the Constitution. As Plaintiff demonstrated before the district court, Mrs. Clinton's appointment as Secretary of State was contrary to the plain language of the Ineligibility Clause of the Constitution. The purported legislative "fix" enacted by Congress – reducing the salary of the office – does not remedy the constitutional violation.

While Plaintiff recognizes that the district court did not reach the merits, the issue of Mrs. Clinton's ineligibility was fully briefed and argued before the court. Most importantly, the expanding use of legislative "fixes" to evade the plain language of a provision of the Constitution is a question worthy of review by this Court. Plaintiff respectfully submits that if our government and courts will not observe even the plain and unambiguous provisions of the

Constitution, then we are cut adrift from the anchor of law and liberty and the rule of law is in jeopardy. The question presented, the proper interpretation of the Ineligibility Clause and workability of a "legislative fix," is substantial and should be set for plenary consideration by this Court.

It was undisputed before the district court that the emoluments of the office of the Secretary of State increased during the second Senate term to which Mrs. Clinton was elected (January 2007 through January 2013). This increase rendered Mrs. Clinton ineligible for appointment to any "civil office under the Authority of the United States" under Art. I, sec. 6, cl. 2. There is no dispute that the office of U.S. Secretary of State is a "civil Office under the Authority of the United States" and that the "emoluments" of that office increased during the time Mrs. Clinton was elected to serve and did serve as U.S. Senator from the State of New York.[3] Accordingly, under the plain language of the Ineligibility Clause, Mrs. Clinton is ineligible to serve as U.S. Secretary of State until January 2013.

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[3] The pay of the Secretary of State increased as a result of a series of cost of living adjustments implemented in 2006 through 2008. The Ineligibility Clause renders a Member ineligible for appointment to a federal office even if the Member did not vote for a particular increase or even after the Member has resigned her seat, if the increase occurs during the term for which the Member was elected. *See* 17 Op. Att'y Gen. 365 (1882) (former senator ineligible for appointment because office was created "during the time for which he was elected.").

Before the district court, Defendants claimed that this violation of the Ineligibility Clause was "fixed" by the Joint Resolution. Specifically, this legislative "rollback" of the salary of the office of Secretary of State allegedly remedied the violation because, according to Defendants, the emoluments of the office will not have increased "on net."

The validity of the legislative "fix" meant to restore Mrs. Clinton's eligibility is at odds with the plain language of the provision. A rollback of a salary increase cannot alter the historical fact that the increase occurred.

A. The Text of the Ineligibility Clause Is Clear and Precise.

The language of the Ineligibility Clause is clear, precise, and readily understood. The provision contains no ambiguity to justify looking beyond its plain language. *Lake County v. Rollins*, 130 U.S. 662 (1889) (stating that the purpose behind a provision "is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument."). The fact that the language of the Ineligibility Clause is readily understood, is, of course, why the political branches have resorted to attempted "end runs" around the provision, as happened in this case, by reducing the compensation of an office after the fact.

The clarity of the Ineligibility Clause is apparent when compared to other constitutional provisions regularly interpreted by the courts. For example, because the language of the Fifth Amendment's Due Process Clause is not capable of precise definition, courts routinely must and do interpret its meaning. In contrast, the Ineligibility Clause is unambiguous and provides clear limitations on eligibility – setting forth exactly who is limited by the provision, the offices to which eligibility is limited, the events which trigger ineligibility, and the precise duration of the ineligibility.

In this way, the Ineligibility Clause is comparable to other bright line restrictions included in the Constitution, such as the minimum age requirement to be "eligible" to hold the office of President. As one commentator has noted, the obvious purpose of this provision is to ensure that only a person with a certain level of maturity can hold the office. John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89, 140 (1995) (hereafter "O'Connor").[4] Presumably no one would suggest that the literal interpretation of that age limitation might be waived simply because a person younger than 35 happens to be unusually mature. Nor would an "on

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[4] *See also* Michael S. Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907 (1994) (concluding that Bentsen's appointment and attempted legislative "fix" were "flagrant and irremediable violation" of Ineligibility Clause) (hereafter "Paulsen").

net" interpretation of the 35-years-old eligibility requirement be proper. It is essentially arguing that a person is eligible to be president if the person reached the age of 35 at some point during the four-year term, and therefore "on net" satisfied the age requirement. Hence, in this instance, there is no reason to ignore the unambiguous language of the Ineligibility Clause simply because a legislative "fix" purportedly satisfies the purpose behind the provision.

Moreover, adherence to the plain language of the Ineligibility Clause is required because, as demonstrated elsewhere in the Constitution, the Framers clearly knew how to allow for "exceptions" when they intended to do so. In particular, when the Framers intended that a disqualification be removable by subsequent legislation, they allowed Congress to do so. This can be seen in a nearby provision in the Constitution, also addressing "emoluments," which provides that "no Person holding any Office of Profit or Trust under [the United States] shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, or any kind whatever, from any King, Prince, or foreign State. U.S. Const. art. I, § 9, cl. 8 (emphasis added). In other words, at the discretion of Congress, the Framers allowed for the possibility that this restriction on emoluments could be waived. This is notably different from the Ineligibility Clause, which includes no similar exception for Congress to act.

Other constitutional provisions with "exceptions" include the prohibition on States from

laying "Imposts or Duties" except as required for executing inspection laws "without the Consent of the Congress." Art. I, § 10, cl. 2. Similarly, no State may enter into compacts with another state or with a foreign power "without the Consent of Congress." Art. I, § 10, cl. 3. These provisions all indisputably demonstrate that the Framers knew exactly how to allow for a legislative exception to a constitutional prohibition. In this case, the Ineligibility Clause contains no such exception to a Member's ineligibility. Congress cannot add an exception that the Framers plainly understood how to include, but did not.

Hence, the language of the Ineligibility Clause is clear and precise. No legislatively enacted "exception" to restore a Member's eligibility is included in the provision.

B. A Plain Language Interpretation Without Any Legislative "Fix" Is Consistent With and Promotes the Framers' Purposes.

While reviewing the history of the Ineligibility Clause is unnecessary, in this instance the purpose of the Framers in adopting the Clause reinforces a literal interpretation of the provision. Significantly, entirely absent from the historical record is any mention of a procedure for Congress to remove or "fix" a Member's ineligibility.

The Ineligibility Clause was the result of a carefully crafted compromise between the Framers.

The initial proposal considered by the Framers would have made all Members "ineligible to any office . . . of the United States" during their terms and an unspecified number of years beyond. 1 Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 217, 228-29 (1911). While some like Alexander Hamilton opposed any limitations on eligibility, those who feared the creation of a strong Executive advocated a complete bar on movement between the legislature and other branches in order to maintain a separation and a balance between the three branches. James Madison stated that "I am . . . of the opinion that no office ought to be open to a member, which may be created or augmented while he is in the legislature." 1 Farrand, at 380. Edmund Randolph was against any movement, stating that he "was inflexibly fixed against inviting men into the Legislature by the prospect of being appointed to offices." *Id.* at 491.

The Framers' determination to maintain strict separation between the branches also is demonstrated by the closely related "Incompatibility Clause" that immediately follows the Ineligibility Clause. U.S. Const., art. I, § 6, cl. 2 ("and no person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."). When read together with the Ineligibility Clause, this further shows how the Framers sought to maintain the balance between the coordinate branches.

In addition to this separation of powers concern, Anti-Federalists were intent on restricting the growth of the federal government and increases in the

compensation of executive offices. *See* O'Connor, at 156-74. They believed that increasing compensation would tend to increase the size of the national government and thereby its involvement in citizens' affairs. The Incligibility Clause would work to limit this tendency by reducing the attractiveness of Executive branch offices to Members by disqualifying Members from holding them. As George Mason stated:

> Are we not struck at seeing the luxury and venality which has already crept in among us? If not checked we shall have ambassadors to every petty state in Europe – the little republic of St. Marino not excepted. We must in the present system remove the temptation . . . . Why has the power of the [British] crown so remarkably increased the last century? . . . [B]y the sole power of appointing the increased officers of government, corruption pervades every town and village in the kingdom . . . .

1 Farrand at 380-81. Hence, the "corruption" that particularly concerned the Anti-Federalists was the creation of offices with increasingly lavish salaries to which legislators would seek appointment and with which the Executive would reward them.

Other contemporaries confirmed this view. James Wilson noted that the purpose of the Ineligibility Clause was to prevent "that of creating unnecessary offices, or granting unnecesary [sic]

salaries." 1 Farrand at 387. Elbridge Gerry, believing that the Ineligibility Clause would reduce Members' temptation to create lucrative offices for their own benefit, even stated that "[i]t is the opinion of a great many that [such offices] ought to be discontinued . . . ." 2 Farrand at 285. Hence, it is clear that the Ineligibility Clause was intended to address "the unnecessary creation of offices, and increase of salaries, [as these] were the evils most experienced." 1 Farrand, at 386.

The Framers' primary concerns, therefore, were broad and intended to affect the behavior of the legislature as a whole. As the Department of Justice's Office of Legal Counsel has explained:

> The Founders had serious reservations about the wisdom of giving to the executive the power to appoint legislators to lucrative and prestigious executive and judicial offices. They also sought to avoid the spectacle of legislators seeking an office throughout their term at the expense of their constituents. They therefore tried to limit the instances in which the executive could offer such enticements to legislators. Thus, to the extent that lowering salaries of vacant offices increases the frequency of such appointments, it serves to frustrate the intentions of the Framers.

See Mem. for the Counselor to the Atty. General, from Charles J. Cooper Re: Ineligibility to Assume a Vacancy on the Supreme Court at 6 (Aug. 24, 1987) (hereafter "1987 OLC Opinion") (attached as Exh. 2 to Defs.' Mot. to Dismiss).[5]

As the 1987 OLC opinion notes, temporarily decreasing the salary of an office actually undermines the purpose behind the Clause. By restoring eligibility for these offices through a legislative artifice, it effectively removes any incentive for Members not to pursue such offices at the "expense of their constituents." The Anti-Federalists particularly feared the emergence of a "permanent political class" which would want to increase the power and size of the central government by taxing the nation. O'Connor at 158-61. If federal offices were available to them, Members would tend to become part of this political class and detached from their local communities. *Id.*

Similarly, with the availability of a legislative "fix," Members have no incentive to restrain the overall growth in compensation of these offices because

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[5] A legislative "fix" also is ineffectual, and further violates the spirit of the Ineligibility Clause, because nothing prevents Congress from reducing the salary of the office the day before the Member is nominated, and then restoring the full salary the day after the Member assumes the office. *See* 1987 O.L.C. Op. at 6-7. This further demonstrates how a legislative "fix" effectively removes any incentive for Congress to restrain the salaries of these offices, given that a "fix" is available to remove their ineligibility for any particular office.

they know that their disqualification can be removed by Congress. As one commentator has summarized:

> The debates at the Constitutional Convention support the view that the [Ineligibility] Clause was intended to have its effect at the legislative stage, when Congress is considering legislation that would be a disqualifying event. The debates also demonstrate, however, that the predominant purpose behind reducing Congress's bias was not for general anticorruption; rather, the overriding purpose of the [Ineligibility] Clause was to restrain the inevitable growth of the national government through the means of reducing Congress's incentive to create lucrative federal offices.

O'Connor at 167. Only if the Ineligibility Clause is interpreted consistent with its plain language, disqualifying Members from holding these offices, are the broad purposes behind the Ineligibility Clause given full effect.

Finally, it is clear that the Ineligibility Clause was carefully crafted by the Framers, representing a balancing of concerns between those who wanted no restrictions on legislators holding federal offices and those who believed in a complete prohibition. Hence, a compromise provision was adopted with a limited period of ineligibility and with no exceptions. Any

legislative "fix" is nothing more than an evasion of this carefully considered compromise that resolved an issue of great concern to the Framers. A compromise of such weighty concerns should not be casually ignored or modified for current convenience.

C. Disregard of the Plain Language of the Ineligibility Clause Cannot Justify Further Violations.

It is not in dispute that the political branches have resorted to "end runs" around the Ineligibility Clause with growing frequency. The increasing use of this constitutionally suspect maneuver provides another reason why this Court should review this question.

First, history shows that until relatively recently the Ineligibility Clause was readily understood and applied consistent with its plain language. The earliest instance in which the Ineligibility Clause seems to have been at issue – and most contemporaneous with the drafting of the Constitution – was when President George Washington nominated then-Governor William Paterson of New Jersey as an Associate Justice of the U.S. Supreme Court. *See* Todd B. Tatelman, Congressional Research Service Report for Congress, *The Emoluments Clause: History, Law, and Precedents* at 4 (January 7, 2009) (available at www.crs.gov). Governor Paterson previously had been a member of the U.S. Senate when the law creating the new judicial office was enacted, and even though

Paterson had resigned to become governor, the term for which he had been elected to the Senate would not have ended until March 4, 1793. On February 28, 1793, President Washington notified the Senate that:

> It has since occurred that [Paterson] was a member of the Senate when the law creating that Office was passed, and that the time for which he was elected is not yet expired. I think it my duty therefore to declare, that I deem the nomination to have null by the Constitution.

See 1 The Documentary History of the Supreme Court of the United States: Part I, Appointments and Proceedings, 90 (Maeva Marcus & James R. Perry, eds. 1985). President Washington then resubmitted the nomination on March 4, 1793, thereby complying with the plain terms of the Ineligibility Clause.

Nearly one hundred years later, this plain language interpretation of the Clause again continued to be strictly followed. In one case, Senator Kirkwood of Iowa had been elected to a term expiring in 1883. Kirkwood resigned from the Senate in 1881 to become Secretary of the Interior and, after leaving that position, sought to assume the post of tariff commissioner in 1882. U.S. Attorney General Benjamin Harris Brewster issued an opinion that Kirkwood could not assume the position of tariff commissioner, even though he was no longer a member of the Senate when the tariff commissioner position was created. The Attorney General's opinion found

nothing ambiguous about the Clause and no need to review its purposes:

> It is unnecessary to consider the question of the policy which occasioned this constitutional prohibition. I must be controlled exclusively by the positive terms of the provision of the Constitution. The language is precise and clear, and, in my opinion, disables him from receiving the appointment. The rule is absolute, as expressed in the terms of the Constitution, and behind that I can not go, but must accept it as it is presented regarding it application in this case.

17 Op. Att'y Gen. 365 (1882). Again, nothing about the language (or grammar) of the Ineligibility Clause was found to be ambiguous.

This plain language interpretation was reaffirmed by a different Attorney General twelve years later. In the case, Senator Matthew Ransom had been elected to a term expiring on March 3, 1895. On February 23, 1895, President Grover Cleveland nominated Senator Ransom to be ambassador to Mexico, despite that the salary of the position had increased in 1891 during Ransom's tenure in the Senate. On March 4, 1895, the day after his Senate term expired, Senator Ransom received his commission. Acting Attorney General Holmes Conrad issued an opinion that, because Senator Ransom's

appointment was made while he was still in the Senate, "Mr. Ransom was not, in my opinion, eligible to appointment to that office." 21 Op. Att'y Gen. 211 (1895).[6]

Beginning with the nomination of Senator Philander Knox in 1909 and then, in particular, the nomination of William Saxbe as Attorney General in 1973, the employment of the "Saxbe Fix" to "work around" the Ineligibility Clause has become more frequent. It has also remained controversial.

The Saxbe nomination in 1973 was hotly debated, but the Office of Legal Counsel concluded that "the weight of authority seems to believe that the practice is unconstitutional." 1987 OLC Op. at 5 n. 6 (noting that "[a]t those hearings, Professors Phillip Kurland, Willard Lorenson, William Swindler, and Paul Mishkin all opposed the reduction in pay of the attorney general to enable Senator Saxbe to take the office as unconstitutional," with only Professor William Van Alstyne taking an opposite view). Another notable critic of the constitutionality of the "Saxbe Fix" was then professor, now Justice, Stephen G. Breyer.

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[6] *See also* 33 Op. Att'y Gen. 88 (1922). Applying strict reading of the Ineligibility Clause, Attorney General Harry Daugherty concluded that the nomination of Senator William Kenyon to a federal court of appeals was not precluded since the increase in salary occurred during the Senator's previous term in office, not the term during which he was appointed. *See* OLC Opinion of December 31, 1996 re: nomination of Bill Richardson as United States Ambassador to the United Nations (reaffirming prior position).

In a letter addressed to Senator Robert C. Byrd, Professor Breyer wrote:

> An office for which Congress has once voted a pay increase has been made more attractive through a pay increase even if Congress passes remedial legislation. The reason is simply that in such a case Congress is infinitely more likely to re-vote the pay increase as soon as the Senator's disqualification expires than if Congress had never voted a pay increase for the office.

See 119 Cong. Rec. 38,331 (1973).

More recently, in 1987, the possible nomination of Senator Orrin Hatch to the U.S. Supreme Court apparently was derailed because of a plain language interpretation of the Ineligibility Clause. *See* 1987 OLC Op.; *see also* Paulsen at 912-14. The 1987 OLC opinion is unequivocal in that, because of an increase in salaries of Supreme Court Justices, "all those congressmen now in office" are ineligible for "the current vacancy on the Supreme Court." 1987 OLC Op. at 4. As the 1987 OLC opinion makes clear, the historical fact that salaries of Supreme Court Associate Justices were increased cannot be altered or "fixed" by a subsequent reduction in salary.

These examples demonstrate that no "consistent constitutional practice" has been followed to justify Defendants' "on net" interpretation or any legislative

"fix" to a Member's ineligibility. On the contrary, the history shows that the plain language of the Ineligibility Clause has been readily understood, but at times circumvented for expediency by the political branches. These "end runs" around the plain language of the provision certainly do not justify any further violations.

CONCLUSION

Probable jurisdiction should be noted and consideration of the appeal expedited in accordance with Congress' wishes.

Respectfully submitted,

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DECEMBER 31, 2009

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID C. RODEARMEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 09-171
	)	
HILLARY RODHAM CLINTON, Secretary of State, and UNITED STATES DEPARTMENT OF STATE,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

PER CURIAM: This case is before the court on the defendants' motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and the plaintiff's cross-motion for summary judgment pursuant to Rule 56(c). The plaintiff, David Rodearmel, a Foreign Service Officer in the United States Department of State (State Department), brought suit against the defendants, Hillary Clinton in her official capacity as Secretary of State and the State Department, alleging that Clinton's appointment and

continuance in office as Secretary of State violates article I, section 6, clause 2 of the United States Constitution.[1] For the reasons set forth below, we dismiss the complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

I.

Rodearmel has been a commissioned United States Foreign Service Officer since 1991. Complaint (Compl.) ¶ 6. At his commissioning, Rodearmel took the following statutorily-prescribed oath:

> I, [David Rodearmel], do solemnly swear that I will support and defend the Constitution of the United States against

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[1]Article I, section 6, clause 2 of the United States Constitution provides:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

We refer to the language before the semicolon as the Ineligibility Clause. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 210 (1974) (referring to first limitation of U.S. Const. art. 1, § 6, cl. 2 as "Ineligibility Clause" and second limitation as "Incompatibility Clause").

> all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

Id. ¶ 7; *see* 5 U.S.C. § 3331 (2006) ("An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: . . . .").

In November 2006, Clinton was reelected to serve a second six-year term as a United States Senator from New York beginning on January 3, 2007. Compl. ¶ 9. On January 21, 2009, Clinton was sworn in as Secretary of State after resigning her Senate seat. *Id.* The salary for the Secretary of State was increased by executive order at least twice during Clinton's second term and before she became Secretary of State. *See* Exec. Order No. 13,454, 73 Fed. Reg. 1481 (Jan. 4, 2008) (salary increase effective first pay period after January 1, 2008); Exec. Order No. 13,483, 73 Fed. Reg.78,587 (Dec. 18, 2008) (salary increase effective first pay period after January 1, 2009).[2] On

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[2]An earlier executive order issued on December 21, 2006, increasing the Secretary of State's salary effective January 7, 2007. Exec. Order No. 13,420, 71 Fed. Reg. 77,571 (Dec. 21, 2006) (salary increase effective first pay period after January 1, 2007); *see* Memorandum from Linda M. Springer, Director, U.S. Office

December 10, 2009, the Congress passed a joint resolution, signed into law by the President on December 19, 2009, providing:

> The compensation and other emoluments attached to the office of Secretary of State shall be those in effect January 1, 2007, notwithstanding any increase in such compensation or emoluments after that date under any provision of law, or provision which has the force and effect of law, that is enacted or becomes effective during the period beginning at noon of January 3, 2007, and ending at noon of January 3, 2013.

S.J. Res. 46, 110th Cong. § 1(a), Pub. L. No. 110-455, 122 Stat. 5036, 5036 (2008) (Secretary of State Emoluments Act) (effective 12:00 p.m. on January 20, 2009).

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of Pers. Mgmt. to Heads of Executive Dep'ts & Agencies (Dec. 21, 2006), http://www.opm.gov/oca/compmemo/2006/2006-19.asp (first pay period after January 1, 2007 began January 7, 2007). Depending on whether the Ineligibility Clause refers to the date a salary increase is authorized or to its effective date, this increase may also implicate the Ineligibility Clause but we need not decide the matter.

On January 29, 2009, Rodearmel brought suit in this court against Clinton and the State Department.[3] In Count I, he alleges that "Clinton's appointment and continuance in office as U.S. Secretary of State violates [the Ineligibility Clause]" and that he "is suffering and will continue to suffer significant, irreparable harm by reason of Defendant Clinton's unconstitutional appointment and continuance in office." Compl. ¶¶ 21-22. In Count II, he alleges that the defendants "are violating [his] rights under the Fifth Amendment to the U.S. Constitution by depriving [him] of his property right to continued employment as a U.S. Foreign Service Officer at the U.S. Department of State without due process of law." *Id.* ¶ 25. Rodearmel requests that the court (1) declare Clinton's appointment and continuance in office to be in violation of the Ineligibility Clause; (2) declare that the defendants' requirement that Rodearmel "serve under, take direction from, and report to Defendant Clinton" violates his rights under the Fifth Amendment; (3) enjoin Clinton from continuing to serve as Secretary of State; and (4) enjoin the State Department from

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[3]Rodearmel requested a three-judge panel pursuant to the Secretary of State Emoluments Act, which provides that "[a]ny claim challenging the constitutionality of the appointment and continuance in office of the Secretary of State on the ground that such appointment and continuance in office is in violation of [the Ineligibility Clause] in an action brought under paragraph (1) shall be heard and determined by a panel of three judges in accordance with section 2284 of title 28, United States Code." S.J. Res. 46 § 1(b)(2), 122 Stat. at 5036; *see* 28 U.S.C. § 2284(b)(1) (authorizing chief judge of circuit to designate three-judge court).

requiring Rodearmel "to serve under, take direction from, and report to Defendant Clinton." *Id.* at 8.

On May 20, 2009, the defendants moved to dismiss the complaint, arguing that Rodearmel lacks standing to raise his claims or, in the alternative, that Clinton's appointment does not violate the Ineligibility Clause. Rodearmel then filed a cross-motion for summary judgment. On the merits, he argues that an increase in the salary of a civil office during a Senator's term disqualifies the Senator from being appointed to that office under the Ineligibility Clause notwithstanding the Congress's enactment of legislation reducing the salary to the level it was at the time the senatorial term began. We heard arguments on the motions on September 16, 2009.

II.

We first address the defendants' challenge to Rodearmel's standing and thus to our subject matter jurisdiction. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1286 (D.C. Cir. 2005) ("Want of jurisdiction robs a federal court of the power to act [and] standing is a prerequisite to jurisdiction.") (internal citations omitted). Rodearmel asserts that our jurisdiction arises both from the Secretary of State Emoluments Act and from 28 U.S.C. § 1331, the latter granting original jurisdiction to the district court of "all civil actions arising under the Constitution." "A litigant challenging government action under a federal statute must satisfy" both "the constitutional requirements of standing" and "its

prudential prerequisites." *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1507 (D.C. Cir. 1995). To establish standing under Article III of the Constitution, a party "must allege (1) a personal injury-in-fact that is (2) fairly traceable to the defendant's conduct and (3) redressable by the relief requested." *Rainbow/PUSH Coal. v. FCC*, 396 F.3d 1235, 1240 (D.C. Cir. 2005) (internal quotations omitted). "To establish prudential standing, a party's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1266 (D.C. Cir. 2004) (internal quotations omitted).

We first examine whether Rodearmel has prudential standing under the Secretary of State Emoluments Act. The Act provides:

> Any person aggrieved by an action of the Secretary of State may bring a civil action in the United States District Court for the District of Columbia to contest the constitutionality of the appointment and continuance in office of the Secretary of State on the ground that such appointment and continuance in office is in violation of article I, section 6, clause 2, of the Constitution. The United States District Court for the District of Columbia shall have exclusive jurisdiction over such a civil action, without regard to the sum or value of the

matter in controversy.

S.J. Res. 46 § 1(b)(1), 122 Stat. at 5036. We emphasize that the Act requires that Rodearmel be "aggrieved *by an action* of the Secretary of State." *Id.* (emphasis added). The complaint alleges that Rodearmel "is being aggrieved by the actions of Defendants Clinton and the U.S. Department of State. Namely, Plaintiff is being required to serve under, take direction from, and report to Defendant Clinton." Compl. ¶ 16. But nowhere does Rodearmel allege that Clinton has given him any specific order or direction or taken any other action that has aggrieved him. Because Rodearmel has failed to allege that Clinton has taken *any* action—much less an action that has aggrieved him—he does not come within the "zone of interests" protected by the Secretary of State Emoluments Act and therefore lacks prudential standing.[4]

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[4]At the hearing, counsel for Rodearmel asserted that the "action of the Secretary of State" that aggrieved him was Clinton's taking the oath of office. While taking an oath may be considered an action, Clinton took the oath of office in order to become, i.e., *before* becoming, Secretary of State. Accordingly, her taking the oath of office is not an action "of" the Secretary of State within the meaning of the Emoluments Act.

We next consider whether Rodearmel has Article III standing.[5] As set out above, Article III standing requires that a party demonstrate an "(1) injury-in-fact, (2) causation, and (3) redressability." *Rainbow/PUSH Coal. v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The injury-in-fact must be both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations and citations omitted). "In analyzing . . . standing at the dismissal stage, we must assume that [the plaintiff] states a valid legal claim" and we "must accept the factual allegations in the complaint as true." *Info. Handling Servs., Inc. v. Def. Automated Printing Servs.*, 338 F.3d 1024, 1029 (D.C. Cir. 2003) (internal quotations and citations omitted). Applying this standard, we conclude that Rodearmel lacks constitutional standing.

Previous challenges to presidential appointments under the Ineligibility Clause have failed for lack of an injury in fact necessary for standing. In *Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam), a member of the bar of the United States Supreme Court challenged the appointment of Justice Hugo Black to the High Court under the Ineligibility

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[5]Whether or not Rodearmel has prudential standing under the Secretary of State Emoluments Act, he must demonstrate Article III standing under either the Act or 28 U.S.C. § 1331. *See Taylor*, 56 F.3d at 1507.

Clause.[6] The Court noted that the petitioner had "disclose[d] no interest . . . other than that of a citizen and a member of the bar of this Court" and concluded that his interest was "insufficient" to support jurisdiction. 302 U.S. at 634. The Court stated:

> It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.

Id.

In *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho 1981), *aff'd sub nom. McClure v. Reagan*, 454 U.S. 1025 (1981), a United States Senator alleged that the appointment of a member of the House of Representatives to the United States Court of Appeals for the District of Columbia Circuit violated the Ineligibility Clause. Relying on *Levitt*, the three-judge district court rejected the Senator's standing as a "private individual." 513 F. Supp. at 269-70. The court also rejected his standing as a legislator. *Id.* at 270.

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[6]Justice Black was a United States Senator at the time of his judicial appointment.

While the Senator had an interest in "'maintaining the effectiveness of (his) votes,'" the challenged judicial appointment did not impair the effectiveness of the Senator's vote against confirmation. *Id.* (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)) (first alteration in *McClure*).[7] Accordingly, the district court "conclude[d] that a United States Senator, suing in either his individual capacity or his official capacity as a senator, lacks standing to challenge the validity of the appointment of a federal judge." *Id.* at 269. The court also concluded that the special jurisdictional statute "purport[ing] to grant standing" did not "confer upon a senator . . . a 'right' to seek a decision from a federal court that such a senator . . . would otherwise be powerless to procure." *Id.* at 271.[8]

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[7]In *Coleman*, a group of Kansas state senators challenged a state senate resolution ratifying a proposed amendment to the United States Constitution, arguing that the deciding vote in favor of the resolution was invalid. 307 U.S. at 435-36. On appeal from the state supreme court, the United States Supreme Court concluded that the state senators had standing to appeal because they "claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court ha[d] denied that right and privilege." *Id.* at 438.

[8]The statute at issue in *McClure* provided:

> (1) Any Member of Congress, whether he voted to confirm or not to confirm the appointment of any judge appointed during the 96th Congress to the United States Court of Appeals for the District of Columbia, or whether he abstained from, or was not present for such vote, may bring a civil action in the United States District Court for the

We see no dispositive difference between the injury alleged by Rodearmel and those asserted by the *Levitt* and *McClure* plaintiffs, respectively. As in those cases, Rodearmel's general interest as a citizen in the constitutionality of Clinton's appointment does not give him standing. Nor does his employment as a Foreign Service Officer provide a basis for standing. He points to no specific duty or responsibility he has as a Foreign Service Officer that has been impaired—or even affected—by Clinton's appointment. *See McClure*, 513 F. Supp. at 270 (no standing because effectiveness of Senator's vote not impaired); *Coleman*, 307 U.S. at

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> District of Columbia or in any United States District Court in the State he represents to contest the constitutionality of the appointment and continuance in office of said Circuit Judge on the ground that such appointment and continuance in office is in violation of Article I, section 6, clause 2 of the Constitution; (2) The designated United States District Courts shall have exclusive jurisdiction, without regard to the sum or value of the matter in controversy, to determine the validity of such appointment and continuance in office; (3) Any action brought under this section shall be heard and determined by a panel of three judges in accordance with the provisions of section 2284 of title 28, United States Code. Any appeal from the action of a court convened pursuant to such section shall lie to the Supreme Court; and (4) Any judge designated to hear any action brought under this section shall cause such action to be in every way expedited.

McClure, 513 F. Supp. at 266 n.1 (quoting Act of October 12, 1979, Pub. L. No. 96-86, § 101(c), 93 Stat. 656, 657-58).

438 (standing because state legislators have "a right and privilege under the Constitution of the United States to have their votes given effect and the state court ha[d] denied that right and privilege"). Instead, he argues that "requiring [him] to serve under, take direction from, and report to a constitutionally ineligible superior impairs [his] effectiveness as a U.S. Foreign Service Officer and an Officer of the United States because doing so is in direct conflict with [his] oath" to uphold the Constitution. Opposition to Defendants' Motion to Dismiss and Plaintiff's Memorandum in Support of His Cross-Motion for Summary Judgment at 13-14. Specifically, he claims that he "cannot serve under Defendant Clinton without violating his oath" and that "[s]hould [he] refuse to serve under, take direction from, or report to [her], [he] would be at substantial risk of disciplinary action, including removal, for insubordination or other, related grounds." Compl. ¶ 17.

Rodearmel relies on *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Clarke v. United States*, 705 F. Supp. 605 (D.D.C. 1988), *aff'd*, 886 F.2d 404 (D.C. Cir. 1989), *reh'g denied*, 898 F.2d 161 (D.C. Cir. 1989) *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990), to support his standing based on the taking of his oath. In *Allen*, a New York law required local school boards of education to lend textbooks to private schools, including parochial schools. 392 U.S. at 239. One school board brought suit in state court against the New York Commissioner of Education challenging the constitutionality of the state law under the First and Fourteenth Amendments to the United States

Constitution. *Id.* at 240-41. On appeal from the New York Court of Appeals, the United States Supreme Court concluded that the school board members had standing, declaring:

> [The school board members] have taken an oath to support the United States Constitution. Believing [the state law] to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with [the state law]—that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that [the school board members] thus have a "personal stake in the outcome" of this litigation.

Id. at 241 n.5 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).[9] In *Clarke*, the Congress conditioned the appropriation of funds to the District of Columbia (D.C.) upon the D.C. Council's enacting an ordinance permitting religious educational institutions to deny funding, services and facilities to any organization promoting a homosexual lifestyle or belief. 705 F. Supp. at 606-07. All thirteen members of the D.C. Council brought an action alleging that the statute appropriating funds to D.C. violated the First

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[9]The quoted footnote contains the Supreme Court's entire discussion of standing in *Allen*; the Court went on to uphold the New York law. *Allen*, 392 U.S. at 241 n.5, 248.

Amendment to the United States Constitution. *Id.* at 607. The court concluded that the Council members had standing because their injury—"deprivation by Congress of their first amendment right to vote in accordance with their own views of the constitution and the public interest"—was "sufficiently specific and concrete to satisfy requirements of standing." *Id.* at 608. In the alternative, the court found that the Council members had standing because they "must either vote in a way which they believe violates their oaths [to uphold the Constitution], or face almost certain loss of their salaries and staffs as well as water, police and fire protection." *Id.* at 608 (citing *Allen*, 392 U.S. 236).

In contrast to the plaintiffs in *Allen* and in *Clarke*, Rodearmel has not alleged that he has been required to take any action that he believes is itself unconstitutional and that would therefore lead him to violate his oath of office. In both *Allen* and *Clarke*, the plaintiffs either had to take an action that they believed violated the Constitution or risk a concrete injury. *See Allen*, 392 U.S. at 240 (school board members were required to "lend books to parochial school students," which they believed to be in violation of [the First Amendment], or risk being removed from office); *Clarke*, 705 F. Supp. at 608 ("Council members must either vote in a way which they believe violates [the First Amendment], or face almost certain loss ...."). Rodearmel, on the other hand, merely alleges that "serving under, taking direction from, and reporting to" Clinton would be contrary to his oath of office without alleging the specific constitutional

violation that he believes he would be committing by remaining under her supervision. Assuming Clinton unconstitutionally holds office as Secretary of State, it does not follow that a Foreign Service Officer generally serving under, taking direction from and reporting to Clinton performs an unconstitutional act thereby, especially in the absence of any allegation that his service is in any way different from what it was under Clinton's predecessors in office. Accordingly, Rodearmel's reliance on the notion of oath-based standing recognized in *Allen* and *Clarke* is misplaced.

Rodearmel also lacks Article III standing to pursue his due process claim. In Count II, he claims that the defendants are "depriving [him] of his property right to continued employment" without due process under the Fifth Amendment. Compl. ¶ 25. Specifically, he alleges that being required to "serve under, take direction from, and report to" a constitutionally ineligible superior "materially and fundamentally changes the terms and conditions of [his] employment" and "constructively discharges him from his employment . . . if he is to remain faithful to his oath." Compl. ¶¶ 18-19. We note that Rodearmel remains employed by the State Department as a Foreign Service Officer and his future loss of that position—whether by actual discharge or resignation under circumstances constituting constructive discharge—is entirely speculative. Thus, any injury to Rodearmel's property right in continued employment, to the extent such a right exists, is not "actual or imminent" and does not support his standing. *Lujan*, 504 U.S. at 560 (internal quotations omitted). To the

extent he has a property right in the "terms and conditions" of his employment and assuming these include the right not to be required to violate the Constitution, Rodearmel's claim fails because, as noted, he has not asserted any action he either has taken or must take that is itself alleged to be unconstitutional.[10]

For the foregoing reasons, the court grants the defendants' motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure and denies the plaintiff's cross-motion for summary judgment.

SO ORDERED this 29th day of October, 2009.[11]

KAREN LECRAFT HENDERSON
United States Circuit Judge

REGGIE B. WALTON
United States District Judge

JAMES ROBERTSON
United States District Judge

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[10]Because we conclude that Rodearmel lacks standing based on his failure to allege an injury in fact, we do not reach the causation or redressability elements of standing or the merits of his Ineligibility Clause challenge.

[11]An order will be entered contemporaneously with this memorandum opinion (1) granting the defendants' motion to dismiss and (2) denying the plaintiff's cross-motion for summary judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID C. RODEARMEL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 09-171
	)	
HILLARY RODHAM CLINTON, Secretary of State, and UNITED STATES DEPARTMENT OF STATE,	)	
	)	
Defendants.	)	

ORDER

In accordance with a memorandum opinion issued on this same date, it is

ORDERED that the defendants' motion to dismiss is GRANTED.

It is further ORDERED that the plaintiff's cross-motion for summary judgment is DENIED.

It is further ORDERED that this case is CLOSED.

SO ORDERED this 29th day of October, 2009.

KAREN LECRAFT HENDERSON
United States Circuit Judge

REGGIE B. WALTON
United States District Judge

JAMES ROBERTSON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. RODEARMEL,)	
)	
Plaintiff,	) No. 1:09-cv-00171-RBW-JR
)	
v.	)
)	Honorable Karen LeCraft Henderson
HILLARY RODHAM CLINTON, et al.	) Honorable James Robertson
)	
Defendants.	) Honorable Reggie B. Walton
)	

NOTICE OF APPEAL

Notice is hereby given that David C. Rodearmel, plaintiff in the above-named case, hereby appeals to the United States Supreme Court from the October 29th, 2009 order dismissing this action. Direct appeal to the Supreme Court in this matter is proper pursuant to 5 U.S.C. § 5312 note (Pub. L. No. 110-455, § 1(b)(3)(A), 122 Stat. 5035).

Respectfully submitted,

JUDICIAL WATCH, INC.

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Dated: November 3, 2009

APPENDIX D

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

U.S. Constitution, Article I, section 6, clause 2.

* * * * *

UNITED STATES PUBLIC LAWS
110th Congress 2nd Session

PUBLIC LAW 110-455 [S.J. Res. 46]
DEC. 19, 2008

[COMPENSATION AND OTHER EMOLUMENTS ATTACHED TO THE OFFICE OF SECRETARY OF STATE]

110 P.L. 455; 122 Stat. 5035;
2008 Enacted S.J. Res. 46; 110 Enacted S.J. Res. 46

JOINT RESOLUTION

Ensuring that the compensation and other emoluments attached to the office of Secretary of State are those which were in effect on January 1, 2007.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. COMPENSATION AND OTHER EMOLUMENTS ATTACHED TO THE OFFICE OF SECRETARY OF STATE.

(a) In General. – The compensation and other emoluments attached to the office of Secretary of State shall be those in effect January 1, 2007, notwithstanding any increase in such compensation or emoluments after that date under any provision of law, or provision which has the force and effect of law, that is enacted or becomes effective during the period beginning at noon of January 3, 2007, and ending at noon of January 3, 2013.

(b) Civil Action and Appeal.

(1) Jurisdiction. – Any person aggrieved by an action of the Secretary of State may bring a civil action in the United States District Court for the District of Columbia to contest the constitutionality of the appointment and continuance in office of the Secretary of State on the ground that such appointment and continuance in office is in violation of article I, section

6, clause 2, of the Constitution. The United States District Court for the District of Columbia shall have exclusive jurisdiction over such a civil action, without regard to the sum or value of the matter in controversy.

(2) Three judge panel. – Any claim challenging the constitutionality of the appointment and continuance in office of the Secretary of State on the ground that such appointment and continuance in office is in violation of article I, section 6, clause 2, of the Constitution, in an action brought under paragraph (1) shall be heard and determined by a panel of three judges in accordance with section 2284 of title 28, United States Code. It shall be the duty of the district court to advance on the docket and to expedite the disposition of any matter brought under this subsection.

(3) Appeal.

(A) Direct appeal to supreme court. – An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order upon the validity of the appointment and continuance in office of the Secretary of State under article I, section 6, clause 2, of the Constitution, entered in any action brought under this subsection. Any such appeal shall be taken by a notice of appeal filed within 20 days after such judgment, decree, or order is entered.

(B) Jurisdiction. – The Supreme Court shall, if it has not previously ruled on the question presented by an appeal taken under subparagraph (A), accept jurisdiction over the appeal, advance the appeal on the docket, and expedite the appeal.

(c) Effective Date. – This joint resolution shall take effect at 12:00 p.m. on January 20, 2009.

Approved December 19, 2008.

MOTION

(3)

No. 09-797

In the Supreme Court of the United States

DAVID C. RODEARMEL, APPELLANT

v.

HILLARY RODHAM CLINTON, SECRETARY OF STATE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over the present appeal.

2. Whether the three-judge district court correctly concluded that appellant lacks standing to bring this suit.

3. Whether, because there was no net increase in the emoluments of the office of Secretary of State during Secretary Clinton's Senate term, her appointment as Secretary of State is consistent with the Ineligibility Clause of the United States Constitution, Art. I, § 6, Cl. 2.

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In the Supreme Court of the United States

No. 09-797

DAVID C. RODEARMEL, APPELLANT

v.

HILLARY RODHAM CLINTON, SECRETARY OF STATE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-17a) is reported at 666 F. Supp. 2d 123.

JURISDICTION

The judgment of the district court was entered on October 29, 2009. A notice of appeal (J.S. App. 20a-21a) was filed on November 3, 2009. The jurisdictional statement was filed on December 31, 2009. The jurisdiction of this Court is invoked under Section 1(b)(3) of the Joint Resolution on Compensation and Other Emoluments Attached to the Office of Secretary of State (Emoluments Act), Pub. L. No. 110-455, 122 Stat. 5036.[1]

[1] Section 1(b)(3)(A) provides, in relevant part, for a direct appeal to this Court from any "final judgment, decree, or order upon the validity of the appointment and continuance in office of the Secretary of State

STATEMENT

1. The Ineligibility Clause of the United States Constitution provides:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time.

U.S. Const. Art. I, § 6, Cl. 2.

By statute, the basic rate of pay for federal employees is automatically increased when private-sector wages show an increase during the preceding year, unless the President directs otherwise "because of national emergency or serious economic conditions affecting the general welfare." 5 U.S.C. 5303(a) and (b).

2. On January 3, 2007, Hillary Rodham Clinton began her second six-year term as an elected United States Senator for the State of New York. On January 7, 2007, the basic rate of pay for federal employees, including the Secretary of State, was increased pursuant to 5 U.S.C. 5303(a). A further pay increase under Section 5303(a) took effect in January 2008. J.S. App. 3a & n.2.

In December 2008, in view of the likelihood that then-Senator Clinton would be nominated to serve as Secretary of State, President George W. Bush signed

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under article I, section 6, clause 2, of the Constitution, entered in any action brought under this subsection." Emoluments Act § 1(b)(3)(A), 122 Stat. 5036. As discussed later (pp. 5-8, *infra*), the Court lacks jurisdiction over this appeal because the judgment below did not address "the validity of the appointment and continuance in office of the Secretary of State under article I, section 6, clause 2, of the Constitution," but rather dismissed the action for lack of standing.

into law a joint resolution of Congress that lowers the emoluments of the Secretary of State to the amount in effect on January 1, 2007, and fixes the Secretary's compensation at that level until January 3, 2013. See Emoluments Act § 1(a), 122 Stat. 5036. The statute also provides that "[a]ny person aggrieved by an action of the Secretary of State may bring a civil action * * * to contest the constitutionality of the appointment and continuance in office of the Secretary of State on the ground that such appointment and continuance in office is in violation of article I, section 6, clause 2, of the Constitution." Emoluments Act § 1(b)(1), 122 Stat. 5036.

On January 21, 2009, Hillary Clinton resigned her Senate seat and was sworn in as Secretary of State. J.S. App. 3a.

3. Appellant is a Foreign Service Officer employed by the United States Department of State. J.S. App. 1a. On January 29, 2009, he filed a complaint against Secretary Clinton and the State Department (appellees here) in federal district court pursuant to Section 1(b)(1) of the Emoluments Act and 28 U.S.C. 1331. Compl. ¶ 1. Appellant alleged that Secretary Clinton's appointment and continuance in office violates the Ineligibility Clause and violates the Fifth Amendment by depriving him of his right to continued employment without due process. *Id.* ¶¶ 21, 25. Appellant further alleged that he has been aggrieved because he "is being required to serve under, take direction from, and report to Defendant Clinton," *id.* ¶ 16, and because Secretary Clinton's constitutional ineligibility to be Secretary of State "materially and fundamentally changes the terms and conditions of [his] employment" by placing his service "in direct and unequivocal conflict with the oath [he] took to defend * * * the U.S. Constitution," *id.* ¶¶ 17-18.

4. On October 29, 2009, the three-judge district court granted appellees' motion to dismiss and denied appellant's cross-motion for summary judgment. J.S. App. 1a-17a.

The court first held that appellant lacks "prudential standing" to sue under the Emoluments Act, which "requires that [appellant] be 'aggrieved *by an action* of the Secretary of State.'" J.S. App. 8a (quoting Emoluments Act § 1(b)(1), 122 Stat. 5036). It reasoned that "nowhere does [appellant] allege that [Secretary] Clinton has given him any specific order or direction or taken any other action that has aggrieved him." *Ibid.*

The court also held that appellant lacks constitutional standing, on the ground that he failed to demonstrate a cognizable injury-in-fact. J.S. App. 9a-17a. The court analogized this case to previous ones in which challenges to Presidential appointments under the Ineligibility Clause have been dismissed for lack of an injury-in-fact sufficient to confer Article III standing, observing that appellant "points to no specific duty or responsibility he has as a Foreign Service Officer that has been impaired—or even affected—by Clinton's appointment." *Id.* at 12a (citing *Ex parte Lévitt*, 302 U.S. 633 (1937) (per curiam), and *McClure* v. *Carter*, 513 F. Supp. 265 (D. Idaho), aff'd, 454 U.S. 1025 (1981)). It further noted that appellant had not "alleged that he has been required to take any action that he believes is * * * unconstitutional and that would therefore lead him to violate his oath of office," thereby distinguishing appellant from the plaintiffs in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Clarke* v. *United States*, 705 F. Supp. 605 (D.D.C. 1988), aff'd, 886 F.2d 404 (D.C. Cir. 1989), vacated as moot, 915 F.2d 699 (D.C. Cir. 1990). J.S. App. 15a.

The court did not reach "the causation or redressability elements of standing or the merits of [appellant's] Incligibility Clause challenge." J.S. App. 17a n.10.

ARGUMENT

As a threshold matter, this Court lacks jurisdiction over the present appeal because it is not taken from a judgment or order "upon the validity of the appointment and continuance in office of the Secretary of State under" the Ineligibility Clause. Emoluments Act § 1(b)(3)(A), 122 Stat. 5036. The Court should thus dismiss this appeal. Alternatively, the Court should summarily affirm the judgment of the three-judge district court that appellant lacks standing both under Article III and under the terms of the statute. Even if the Court were to reach appellant's Ineligibility Clause claim, it should affirm the judgment because that claim fails on the merits.

I. THE COURT LACKS JURISDICTION OVER THIS APPEAL

Appellant contends (J.S. 2) that this Court possesses jurisdiction over the present appeal under Section 1(b)(3) of the Emoluments Act. That provision states:

> (3) APPEAL.—
>
> (A) DIRECT APPEAL TO SUPREME COURT. —An appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order upon the validity of the appointment and continuance in office of the Secretary of State under article I, section 6, clause 2, of the Constitution, entered in any action brought under this subsection. Any such appeal shall be taken

> by a notice of appeal filed within 20 days after such judgment, decree, or order is entered.
>
> (B) JURISDICTION.—The Supreme Court shall, if it has not previously ruled on the question presented by an appeal taken under subparagraph (A), accept jurisdiction over the appeal, advance the appeal on the docket, and expedite the appeal.

Emoluments Act § (1)(b)(3), 122 Stat. 5036-5037.

The district court in this case, however, did not issue a judgment or order "upon the validity of the appointment and continuance in office of the Secretary of State under article I, section 6, clause 2, of the Constitution." Emoluments Act § (1)(b)(3)(A), 122 Stat. 5036. Indeed, the district court expressly stated that it did "not reach * * * the merits of [appellant's] Ineligibility Clause challenge." J.S. App. 17a n.10; see J.S. 21 (acknowledging that "the district court did not reach the merits"). Rather, the district court's decision was limited to the threshold issue of standing and dismissed the suit for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1). J.S. App. 17a. Because the plain text of Section 1(b)(3)(A) of the Emoluments Act extends this Court's direct-appeal jurisdiction only to district court orders that decide the Ineligibility Clause question, it does not provide for jurisdiction over this appeal.[2]

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[2] This Court has found its direct-appeal jurisdiction lacking in nearly identical procedural circumstances under 28 U.S.C. 1253, which provides that "any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." See *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 91, 101 (1974) (no direct-appeal jurisdiction under 28 U.S.C. 1253

Section 1(b)(3)(B)'s mandate that the Court, "if it has not previously ruled on the question presented," accept jurisdiction over "an appeal taken under subparagraph (A)" is inapplicable for the same reason. Because the district court did not reach the Ineligibility Clause claim, this is not an appeal properly "taken under subparagraph (A)." Emoluments Act § 1(b)(3)(B), 122 Stat. 5037.[3]

That result, commanded by the text of Section 1(b)(3), also serves an important purpose. As this Court has oft noted, it is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Congress presumably did not intend for this Court to use its limited resources to hear a case on direct appeal from the district court in which the merits of the Ineligibility Clause issue had not been addressed, let alone decided,

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over three-judge district court's dismissal of case for lack of standing); see also *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975) ("[A] direct appeal will lie to this Court under [28 U.S.C.] 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief only where such order rests upon resolution of the merits of the constitutional claim presented below.").

[3] In other statutes permitting direct appeal to this Court from a decision of a three-judge district court, Congress has used broader language in its jurisdictional grant—not tied to the basis of the district court's decision—providing, for example, that "any appeal shall lie to the Supreme Court." *E.g.*, 26 U.S.C. 9010(c); 42 U.S.C. 1973b(a)(5), 1973c, 1973h(c), 1973aa-2, 1973bb(a)(2); see, *e.g.*, 42 U.S.C. 1971(g) ("[a]n appeal from the final judgment of [the three-judge district] court will lie to the Supreme Court"). Congress's use of the narrower, qualified language in Section 1(b)(3)(A) is thus particularly conspicuous and should be accorded due weight.

below. Accordingly, the Court should dismiss the appeal for lack of jurisdiction.[4]

II. APPELLANT LACKS STANDING TO BRING THIS SUIT

To the extent this Court exercises jurisdiction over the appeal, it should summarily reject appellant's contention (J.S. 11-21) that the district court erred in dismissing his suit for lack of standing. The decision below is clearly correct. Appellant lacks Article III standing given the abstract nature of his injury and also fails to meet the prerequisite specified in Section 1(b)(1) of the Emoluments Act—that he be "aggrieved by an action of the Secretary of State"—for bringing a suit like this one. 122 Stat. 5036.

1. a. It is axiomatic that "the party bringing the suit must establish standing to prosecute the action." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004). Where a suit challenges the constitutionality of actions "taken by one of the other two branches of the Federal Government," this Court's "standing inquiry [is] especially rigorous." *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997). For that reason, the Court has invariably declined to consider the merits of a suit challenging executive or legislative action until the plaintiff has estab-

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[4] Although the Emoluments Act does not provide direct appellate jurisdiction in this Court over the present appeal, that does not mean that appellant had no avenue for appellate review at all. The three-judge district court's judgment dismissing the case on standing grounds, like any other final judgment of a district court lacking direct-review jurisdiction in this Court, would have been subject to review in the court of appeals pursuant to 28 U.S.C. 1291. Cf. *Gonzalez*, 419 U.S. at 101 ("[W]hen a three-judge court denies a plaintiff injunctive relief on grounds which, if sound, would have justified dissolution of the court as to that plaintiff, * * * review of the denial is available only in the court of appeals.").

lished that his "claimed injury is personal, particularized, concrete, and otherwise judicially cognizable." *Id.* at 820; see *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) ("To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process * * * [and] distort the role of the Judiciary in its relationship to the Executive and the Legislature.").

A plaintiff may not satisfy Article III's constitutional standing requirement of injury-in-fact by "raising only a generally available grievance about government—claiming only harm to his * * * interest in proper application of the Constitution and laws.'" *Lance* v. *Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573 (1992)). The Court has consistently held that "an injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable." *Lujan*, 504 U.S. at 575; see *Allen* v. *Wright*, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.").

The Court has applied these principles to dismiss suits for lack of standing in several contexts analogous to the present one. In *Reservists Committee to Stop the War*, *supra*, the Court dismissed a citizen suit contending that the reservist status of certain Members of Congress violated the Incompatibility Clause of the Constitution. The Incompatibility Clause, a companion to the Ineligibility Clause, prohibits a Member of Congress from "holding any Office under the United States" during his or her tenure in Congress. U.S. Const., Art. I,

§ 6, Cl. 2. The Court held that the constitutional violation claimed by plaintiffs "affect[s] only the generalized interest of all citizens in constitutional governance, and that is an abstract injury." *Reservists Comm. to Stop the War*, 418 U.S. at 217; see, *e.g.*, *Fairchild* v. *Hughes*, 258 U.S. 126, 129 (1922) (dismissing citizen suit challenging the ratification of the Nineteenth Amendment where plaintiff's "interest in the question submitted" boiled down to a desire "that the Government be administered according to law").

Beyond the context of suits brought by private persons, the Court has rigorously scrutinized assertions by federal officials that Executive Branch or congressional action impaired the performance of their duties. In *Raines*, *supra*, for example, the Court concluded that Members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act, 2 U.S.C. 691 *et seq.*, based on allegations that the bill would dilute their voting power and divest them of their constitutional role. The Court observed that the plaintiffs in that case "have not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies" and "do not claim that they have been deprived of something to which they *personally* are entitled." *Raines*, 521 U.S. at 821. Rather, the Court explained, their claim of standing rested solely on an alleged "institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." *Ibid.* The Court concluded that because plaintiffs "have alleged no injury to themselves as individuals * * * [and] the institutional injury they allege is wholly abstract and widely dispersed," they lacked "a sufficient 'personal stake' in [the] dispute and [had] not alleged a suffi-

ciently concrete injury to * * * establish[] Article III standing." *Id.* at 829-830.

In *Ex Parte Lévitt*, 302 U.S. 633 (1937) (per curiam), the Court applied the injury-in-fact requirement in the context of a challenge, like the one in this case, to a Presidential appointment under the Ineligibility Clause. The Court dismissed a suit, brought by a member of the Supreme Court bar, contending that the appointment of Justice Hugo Black (a former Senator) violated the Ineligibility Clause. The Court noted that the plaintiff's pleadings "disclose no interest * * * other than that of a citizen and a member of the bar of this Court" and that this interest was "insufficient." *Id.* at 634. The Court has subsequently "reaffirm[ed] *Lévitt* in holding that standing to sue may not be predicated upon an interest * * * which is held in common by all members of the public, because of the necessarily abstract nature of the injury." *Reservists Comm. to Stop the War*, 418 U.S. at 220; see *Lance*, 549 U.S. at 440 (relying on *Lévitt* to hold the same); *Lujan*, 504 U.S. at 574-575 (same); *United States* v. *Richardson*, 418 U.S. 166, 177-178 (1974) (same).

b. Applying the principles articulated in the Court's precedents, petitioner lacks Article III standing to bring this suit. Appellant alleges that he is "a commissioned U.S. Foreign Service Officer," Compl. ¶ 6, who "serves under, takes direction from, and reports to the U.S. Secretary of State," *id.* ¶ 15. He further alleges that Secretary Clinton's constitutional ineligibility to be Secretary of State places his service "in direct and unequivocal conflict with the oath [he] took to defend and bear true faith and allegiance to the U.S. Constitution and to faithfully discharge the duties of his office," *id.* ¶ 17, thereby "materially and fundamentally chang[ing] the terms and

conditions of [his] employment," *id.* ¶ 18. And he alleges that "[s]hould [he] refuse to serve under, take direction from, or report to Defendant Clinton, [he] would be at substantial risk of disciplinary action, including removal." *Id.* ¶ 17.

Appellant's allegations that he serves under the Secretary and has sworn an oath to defend the Constitution are insufficient to transform his abstract, generalized injury into the "personal, particularized, [and] concrete" injury required for Article III standing. *Raines*, 521 U.S. at 820. In *Raines* (see pp. 10-11, *supra*), the Court determined that several Members of Congress, subject to the operation of the Line Item Veto Act as well as an oath to uphold the Constitution (see *INS* v. *St. Cyr*, 533 U.S. 289, 300 n.12 (2001)), had no "personal stake" in the act's constitutionality. *Raines*, 521 U.S. at 830. Similarly, in *Lévitt* (see p. 11, *supra*), the Court concluded that a member of the Supreme Court bar, subject to the Court's rules of practice and an oath to support the Constitution of the United States (see *Cole* v. *Richardson*, 405 U.S. 676, 681 (1972)), had no "direct" interest in the constitutionally proper appointment of a Supreme Court Justice. *Lévitt*, 302 U.S. at 634. Appellant's alleged injury is not meaningfully distinguishable from the injuries alleged by the plaintiffs in those cases. *E.g.*, *Raines*, 521 U.S. at 821 (noting plaintiffs' failure to allege that they had "been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies" or "deprived of something to which they *personally* are entitled").

As this Court has observed, an oath to "support" and "defend" the Constitution does not "impose obligations of specific, positive action on oath takers," but simply assures that they are "willing to commit themselves to

live by the constitutional processes of our system." *Cole*, 405 U.S. at 684. Moreover, as the district court recognized (J.S. App. 8a), "nowhere does [appellant] allege that [Secretary] Clinton has given him any specific order or direction or taken any other action that has aggrieved him." Nor does appellant allege that the Secretary has changed the terms of his employment in any tangible way. At best, appellant's asserted injury amounts to the psychic harm produced by his belief that the Secretary's presence in office violates the Constitution. An injury to one's interest in the Government's observance of the Constitution, however, is both too generalized and too abstract to support Article III standing. See, *e.g.*, *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982) ("[T]he psychological consequence presumably produced by observation of conduct with which one disagrees * * * is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms."); *Reservists Comm. to Stop the War*, 418 U.S. at 217 ("[T]he claim advanced by respondents is one which presents injury in the abstract. Respondents seek to have the Judicial Branch compel the Executive Branch to act in conformity with the Incompatibility Clause, an interest shared by all citizens.").

Appellant's reliance (J.S. 14) on *Board of Education* v. *Allen*, 392 U.S. 236 (1968), is misplaced. In *Board of Education*, the Court determined that school board members had a "personal stake in the outcome" of their challenge to a state law requiring them to take a specific action. *Id.* at 241 n.5 (citation omitted). The Court explained that if the plaintiffs, "in reliance on their interpretation of the Constitution, failed to lend books to pa-

rochial school students," they would be removed from office. *Id.* at 240. "[T]o prevent this, [plaintiffs] were complying with the law." *Ibid.* In contrast, as the district court found, appellant has not identified any new duty imposed on him by Secretary Clinton, any specific action that she has required him to undertake, or any "constitutional violation that he believes he would be committing by remaining under her supervision." J.S. App. 15a-16a.

The decision of the district court is also consistent with the lower court decisions cited by appellant. See J.S. 14-16. Like the plaintiffs in *Board of Education*, and unlike the appellant in this case, the plaintiffs in those cases challenged a requirement that they take an expressly identified action alleged to be unconstitutional. In *Clarke* v. *United States*, 705 F. Supp. 605 (D.D.C. 1988), aff'd, 886 F.2d 404 (D.C. Cir. 1989), vacated as moot, 915 F.2d 699 (D.C. Cir. 1990), city council members challenged a law requiring them to "enact [a] specified amendment to the city's Human Rights Act." 886 F.2d at 409. In *Regents of the University of Minnesota* v. *NCAA*, 560 F.2d 352 (8th Cir. 1977), university administrators sought review of a policy requiring them to make a summary finding that certain students were ineligible to play college basketball. *Id.* at 354. And in *Aguayo* v. *Richardson*, 473 F.2d 1090 (2d Cir. 1973), cert. denied, 414 U.S. 1146 (1974), the object of dispute was a welfare law that one set of plaintiffs (the City of New York and the Commissioner of its Department of Social Services) had been required to enforce against another set of plaintiffs (a group of potentially affected women suing on behalf of their minor children). *Id.* at 1093, 1099. Appellant in this case alleges no such affirmative obligation.

2. Congress's enactment of a "right-to-sue" provision does not cure the deficiency in Article III standing, and, in any event, appellant does not satisfy the terms of the relevant provision in this case.

In *McClure* v. *Carter*, 513 F. Supp. 265 (D. Idaho 1981), aff'd, 454 U.S. 1025 (1981), the relevant statute provided that "[a]ny Member of Congress" could bring a civil action to challenge the appointment of "any judge appointed during the 96th Congress to the United States Court of Appeals for the District of Columbia * * * on the ground that such appointment and continuance in office is in violation of Article I, section 6, clause 2 of the Constitution." Act of Oct. 12, 1979, Pub. L. No. 96-86, § 101(c)(1), 93 Stat. 657. The plaintiff, a United States Senator, contended "that his special duties and responsibilities as senator gave him standing" to challenge, under the statute, the appointment of former Representative Abner J. Mikva to the United States Court of Appeals for the District of Columbia. *McClure*, 513 F. Supp. at 266, 270. The three-judge district court dismissed the suit for lack of standing. The court emphasized that even when Congress grants an express right of action, "the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Id.* at 269 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)). This Court summarily affirmed. *McClure* v. *Reagan*, 454 U.S. 1025 (1981). See also *Raines*, 521 U.S. at 815-816, 830 (holding that Members of Congress lacked Article III standing despite statute authorizing suit); *Lujan*, 504 U.S. at 573 (rejecting a court of appeals holding that the plaintiffs' "injury-in-fact requirement had been satisfied by congressional conferral," through a citizen-suit provision, "of an abstract, self-contained, noninstru-

mental 'right' to have the Executive observe the procedures required by law").

In this case, the district court considered appellant's ability to invoke Section 1(b)(1) of the Emoluments Act under the rubric of prudential standing. J.S. App. 7a-8a. Distinct from constitutional standing, "prudential standing encompasses ' * * * the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" *Elk Grove*, 542 U.S. at 12 (quoting *Allen*, 468 U.S. at 751). But regardless whether Section 1(b)(1) of the Emoluments Act is analyzed as part of the standing inquiry or as the conferral of a cause of action or both, it does not benefit appellant in this case.[5]

Section 1(b)(1) provides:

> Any person aggrieved by an action of the Secretary of State may bring a civil action in the United States District Court for the District of Columbia to contest the constitutionality of the appointment and continuance in office of the Secretary of State on the ground

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[5] Section 1(b)(1) of the Emoluments Act, while relevant to the prudential standing inquiry, may properly be viewed as the conferral of a cause of action for an Ineligibility Clause challenge (as well as establishing exclusive jurisdiction in the United States District Court for the District of Columbia). Although appellant brought his suit under both Section 1(b)(1) and 28 U.S.C. 1331, Section 1331 is simply a basis of federal court jurisdiction and not a cause of action. See, *e.g.*, *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 811 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985). Accordingly, appellant's failure to satisfy the terms of Section 1(b)(1) supports a dismissal under Federal Rule of Civil Procedure 12(b)(6), in addition to the dismissal for lack of standing under Rule 12(b)(1).

> that such appointment and continuance in office is in violation of article I, section 6, clause 2, of the Constitution. The United States District Court for the District of Columbia shall have exclusive jurisdiction over such a civil action, without regard to the sum or value of the matter in controversy.

Emoluments Act § 1(b)(1), 122 Stat. 5036. Appellant's inability to identify any specific harm resulting from the Secretary's actions (see pp. 11-14, *supra*) places him outside the plain terms or zone of interests protected by Section 1(b)(1), which, as the district court correctly observed, grants the right to sue only to individuals "aggrieved *by an action* of the Secretary of State." J.S. App. 8a. Section 1(b)(1) therefore does not provide a basis for appellant's suit or overcome his lack of Article III standing.

III. SECRETARY CLINTON'S APPOINTMENT DID NOT VIOLATE THE INELIGIBILITY CLAUSE

If the Court were to reach it, the substance of appellant's Ineligibility Clause challenge—which has not been adjudicated by any tribunal—fails on the merits.

1. The Ineligibility Clause, in relevant part, states:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States * * * the Emoluments whereof shall have been encreased during such time.

U.S. Const. Art. I, § 6, Cl. 2. On its face, the phrase "shall have been encreased" could be read in two different ways. Under appellant's reading (J.S. 21-26), the phrase means "shall have *ever* been encreased," *i.e.*, the Clause prohibits a Member's appointment to a federal

civil office whenever the emoluments for that office were raised at any point during the Member's term, even if any increases in compensation for the position were rolled back before the Member's appointment. The other reading, interpreting the phrase to refer to whether the emoluments "have been encreased" on net, is that the Clause permits a Member of Congress to be appointed to a federal civil office as long as the emoluments for that position are no greater than when the Member assumed congressional office, regardless whether Congress had passed (and later repealed) any increases during the relevant period.

As a matter of plain language, the latter reading is more natural. As the Office of Legal Counsel (OLC) has explained by analogy in a recently published opinion: "If a potential investor asked for a prediction at the beginning of a year whether a stock index 'shall have been encreased' during the year, the question would call for a prediction whether the index would be higher at the year's end as compared to the year's beginning, rather than whether the index would go up at any point during that year." Memorandum Opinion for the Att'y Gen. from David J. Barron, Acting Asst. Att'y Gen., OLC, U.S. Dep't of Justice, *Validity of Statutory Rollbacks as a Means of Complying with the Ineligibility Clause* 4 (May 20, 2009), http://www.justice.gov/olc/2009/ineligibility-clause.pdf (*2009 OLC Op.*). At the very least, contrary to appellant's suggestion (J.S. 23-26), the plain text of the Ineligibility Clause does not compel his alternative reading.

As to any alleged textual ambiguity, the history, purpose, and practice of the Ineligibility Clause establish that the government's construction is correct. *E.g.*, *Alden* v. *Maine*, 527 U.S. 706, 741 (1999) (interpreting